54176

PEOPLE OF THE STATE OF ILLINOIS,) APPEAL FROM
Plaintiff-Appellee,)
) CIRCUIT COURT,
vs.)
) COOK COUNTY.
ANDREW JOHNSON,)
Defendant-Appellant.) HON. THOMAS R. McMILLEN,
Presiding.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant pleaded guilty to a charge of unlawful possession of narcotics and was placed on two years probation. Within that two year period he pleaded guilty to a charge of attempt petty theft. After a hearing held on a rule to show cause, defendant's probation was revoked and he was sentenced to a term of two years to three years in the penitentiary. On this appeal he contends that his waiver of a trial by jury in the plea of guilty to the narcotics charge was not knowingly made, and secondly, that there was no showing that he was aware of the import of, and the consequences of his plea of guilty to the theft charge relative to his probationary status.

Defendant's first contention amounts to a collateral attack on the original judgment entered in the narcotics case. No appeal was taken from that judgment and defendant cannot now be heard to complain.

The record nevertheless reveals that defendant did knowingly and understandingly waive his right to a trial by jury when he entered his plea of guilty to the narcotics charge. When defendant's case was called, counsel informed the trial court that he and defendant had a conference and that defendant wished to waive a trial by jury and to enter a plea of guilty. The following discussion ensued:

> "THE COURT: Andrew Johnson, you heard the statement of your attorney. You realize that on a charge of this kind you are entitled to a trial by jury, do you not?
>
> "THE DEFENDANT: Yes, sir.

"THE COURT: You also realize that by pleading guilty you are in effect waiving your trial by jury?

"THE DEFENDANT: Yes, sir.

"THE COURT: Now, on an offense of this kind...it is a fine of not more than $5,000.00 and imprisonment for not less than two years nor more than ten years.... So do you realize that you can be fined that amount and put in the penitentiary for two to ten years? Do you understand that?

"THE DEFENDANT: Yes, sir.

"THE COURT: So knowing those things, do you wish to plead guilty to that offense?

"THE DEFENDANT: Yes, I do, Your Honor."

Defendant was present when his counsel informed the court that defendant wished to waive his right to a trial by jury and to plead to the charge. Defendant made no objection to the statement of his counsel, and stood mute until the court questioned him concerning the waiver. Defendant knowingly and understandingly waived his right to a jury trial. See People v. Sailor, 43 Ill. 2d 256.

Defendant next contends that the record is void of any evidence showing that he was aware of the import and consequences of a plea of guilty to the petty theft charge upon his probationary standing. He argues that such evidence was necessary before the trial court could made a proper determination in the matter.

A violation of probation must be proven by a preponderance of the evidence. People v. Carroll, 76 Ill. App. 2d 9. In the instant case defendant entered a plea of guilty to a charge of attempt petty theft while he was on probation. It appears from the record that the petty theft charge had been reduced from a felony, and the defendant himself voluntarily informed the trial court at the hearing on the rule to show cause that the police report of the incident showed that he held a knife to the neck of the intended victim while another man attempted to rob the intended victim.

The People entered into evidence at the hearing to show cause

a copy of the plea of guilty to the petty theft charge, and the court revoked defendant's probation and sentenced him to the penitentiary. Section 117-2(a)(1) of the Criminal Code specifically provides that a violation of a penal statute or ordinance constitutes a violation of one's probation. Ill. Rev. Stat. 1967, Chap. 38, Para. 117-2(a)(1). We are of the opinion that there was sufficient evidence adduced at the hearing on the rule to show cause from which the trial court could determine that defendant did in fact violate the terms of his probation.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

McCORMICK, P.J., and LYONS, J., concur.

54180

ARLENE L. OVERHAGE,	)	APPEAL FROM
	)	CIRCUIT COURT OF
Plaintiff-Appellant,	)	COOK COUNTY.
	)	
v.	)	
	)	
THOMAS R. OVERHAGE,	)	HONORABLE
	)	HARRY A. ISEBERG,
Defendant-Appellee.	)	PRESIDING.

MR. JUSTICE DRUCKER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from that part of a judgment which awarded her $30 per week child support for her two minor children.

Plaintiff and defendant were married September 10, 1960, and cohabited until November 3, 1968. Two children were born during the marriage. On November 8, 1968, plaintiff filed for divorce. On December 10, 1968, by agreement of the parties, a temporary order was entered awarding temporary custody of the children to plaintiff, requiring defendant to make all payments for mortgage, taxes, insurance, utilities, repairs, and other insurance, and to pay $30 per week to plaintiff. This order expressly provided that it was "without prejudice to any permanent support order, no hearing having been had on plaintiff's needs." After a hearing on February 19, 1969, a decree for divorce was entered requiring defendant to keep up $13,000 of life insurance with the children as beneficiaries, to pay all attorneys' fees, family expenses of $3,000, awarding plaintiff the custody of the two children, transferring title to the cooperative apartment to plaintiff, including all of the household furniture and furnishings, and requiring defendant to pay $15 per week alimony and $30 per week for child support and to pay their extraordinary medical expenses. The decree terminated defendant's obligations under the temporary order to make payments for mortgage, taxes, utilities, repairs and insurance relating to the apartment.

On appeal plaintiff contends that the trial court had a positive duty to make inquiry and hear evidence concerning the needs of the two minor children in order to make an adequate child support award. In support of her contention plaintiff cites Illinois Revised Statutes, 1967, ch. 40, § 19, which provides in part:

> When a divorce shall be decreed, the court may make such order touching the alimony and maintenance of the wife or husband, the care, custody and support of the children, or any of them as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just and, in all cases, including default cases, the court shall make inquiry with respect to the children of the parties, if any, and shall make such order touching the care, custody, support and education of the minor children of the parties or any of them, as shall be deemed proper and for the benefit of the children.

Plaintiff points out that there was no hearing on plaintiff's needs and that the decree made no provision for payments to cover a place of residence for the children whereas the temporary order by its terms included this item. At the hearing on plaintiff's divorce action the court asked plaintiff if she had worked out an oral property settlement agreement with defendant. Plaintiff answered that such an agreement had been arranged. The court then asked plaintiff if she understood that by the terms of that agreement defendant was responsible for all extraordinary medical, dental and hospital bills; that the cooperative apartment would be conveyed to her with its furnishings; that she was granted the custody of the two minor children with reasonable rights of visitation granted to defendant; and that defendant was required to pay to her $15 per week as alimony and $30 per week child support for their two children. Plaintiff told the court that she understood these terms and the others referred to above which were incorporated into the decree, including her responsibility to make future mortgage payments.

After the court's questioning, plaintiff was given an opportunity to introduce evidence or make additional inquiry challenging the child support award or plaintiff's needs. However, both plaintiff and her attorney were apparently satisfied with the court's inquiry for they made no further comment concerning the adequacy of the child support award or plaintiff's needs.

From our review of the record we believe that the trial court upon its own questioning met the requirement of inquiry as set forth in Section 19. Therefore the judgment is affirmed.

AFFIRMED.

Stamos, P.J., and English, J., concur.

Publish Abstract only.

126 I.A.2 417

54157

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Appellee,	)	OF COOK COUNTY.
	)	
v.	)	
	)	
JAMES ENGLISH,	)	HONORABLE
	)	JAMES A. GEROULIS,
Appellant.	)	PRESIDING.

MR. JUSTICE DRUCKER DELIVERED THE OPINION OF THE COURT.

The Public Defender appointed to represent defendant on this appeal has filed a petition for leave to withdraw pursuant to his determination and belief that an appeal would be wholly frivolous and could not possibly be successful. Pursuant to Anders v. California, 386 U.S. 738, the Public Defender has also filed a brief raising the one issue which he believes might support an appeal: that defendant was denied procedural due process at the hearing which resulted in the termination of his probation.

On July 6, 1966, defendant withdrew a prior plea of not guilty and entered a plea of guilty to robbery and aggravated battery as charged in Indictment No. 66-1898. Judgment was entered on the plea and defendant was placed on probation for five years, the first three months to be served in Cook County Jail. On January 20, 1969, defendant appeared before the trial court charged with violation of the conditions of his probation in that he was convicted of robbery on a guilty plea on December 11, 1968, to Indictment No. 68-1417.

Based on this robbery conviction of December 11, 1968, defendant's probation was revoked and he was sentenced to three to six years. The court reminded defendant that he had violated his probation once before and was discharged and recommitted to probation. This appeal is from the judgment terminating probation.

Illinois Revised Statutes, 1969, Chapter 38, Section 117-3, and the cases decided thereunder have established guidelines to be followed in proceedings for revocation of probation. Such guidelines are: defendant is entitled to a conscientious judicial determination according to accepted and well recognized procedural methods upon whether the conditions of his probation have been violated; defendant must be notified of the alleged violations of his probation and be given an opportunity to defend against and to refute the alleged violations; and defendant is entitled to the assistance of counsel. See People v. Price, 24 Ill. App. 2d 364.

In the instant case the record shows that the procedure followed by the trial court was in accordance with these guidelines. The defendant was informed of the facts of his probation violation, was present in court with counsel, and the State presented evidence of a conviction of robbery on December 11, 1968. In view of this evidence we agree with the Public Defender that an appeal on this ground would be without merit.

On March 11, 1970, defendant was notified by this court of the Public Defender's motion to withdraw and was sent copies of the petition and the brief in support thereof. He was advised that he had until May 15, 1970, to file any points he might choose in support of his appeal. Defendant has failed to file any such points.

We have thoroughly considered the Public Defender's brief in support of his motion to withdraw and have made a careful examination of all the proceedings. We conclude that the appeal is wholly frivolous and without merit. The motion of the Public Defender for leave to withdraw is granted and the judgment is affirmed.

AFFIRMED.

English and Leighton, JJ., concur.

Abstract.